Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1996

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE, MILDRED V. BAECKE, ET AL

Petitioners

v.

THE UNITED STATES

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Craig L. Austin
Attorney for Petitioners
300 Convent, Suite 2510
San Antonio, Texas 78205-3789
210/222-2331, Fax: 222-2334

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

41PP

QUESTIONS PRESENTED FOR REVIEW

This application for writ of certiorari presents the following issues for review:

1. Whether 28 U.S.C. §1500 prohibits jurisdiction in the Court of Federal Claims because of the pendency of the same claim against the City of San Antonio.

2. Whether the government's pleadings and claims of prior takings of easements invoke the Quiet Title Act, 28 U.S.C. § 2409a and the 12-year statute of limitations therein.

3. Whether this cause should be dismissed or remanded to the District Court.

4. Whether the sole limitations defense available to the United States is its prior perfection, over a period of 10 years, of a permanent prescriptive avigation easement under Texas easement and inverse condemnation law.

5. Whether the physical and regulatory takings were "progressive" so as to defer the accrual of landowners' cause of action.

6. Whether the trial court may disregard or disbelieve official findings of noise contours and low flights supplied by and admitted by the government.

7. Whether invidiously discriminatory land use regulations procured by the Air Force from local authorities in accordance with a mandatory federal regulation requiring such procural only as to military Accident Potential Zones are attributable to the United States.

PARTIES TO THE PROCEEDING

All Plaintiffs-Petitioners are owners of the tracts of land shown on Figures 1 and 2, infra., and are listed herein:

DARSON H. PERSYN, CLOTILDE PERSYN, FLORENT BAECKE MILDRED V. BAECKE, PAUL PERSYN, ERMA PERSYN, RAUL JIMENEZ, SR., AVIEL L. BROEKHOVE, JOSIE A. BROEKHOVE, CELESTE PERSYN WORRICK, Indv. and as Ind. Exec. of Est. of LEONA PERSYN, Dec'd, RICHARD PERSYN, GABRIEL THIENPONT, EMMA PERSYN, MARY ROSENBUSH, MARGARET MILAM, HORTENSE BROEKHOVE, 4M PROPERTIES, INC., SOMERSET ROAD JOINT VENTURE, PHIL M. BROEKHOVE, EMIEL P. BROEKHOVE, REMI AELVOET, MARSHALL AELVOET, RICHARD AELVOET, IRMA PERSYN, ELSIE AELVOET VERELST, ALINE WAUTERS, RAYMOND WAUTERS, LORRAINE WAUTERS, GEORGE VERSTUYFT, IRMA VERSTUYFT, ROBERT VERSTUYFT, RAYMOND VERSTUYFT, NORMAN VERSTUYFT, MARGARET VERSTUYFT, ROGER VERSTUYFT, PATRICIA VERSTUYFT, CLARA VERSCHELDEN, ALENE BUYS, CLARA VERSTUYFT PERSYN, HENRY VERSTUYFT, JULIANA V. VERSTUYFT, HOMER VERSTUYFT, YVONNE VERSTUYFT, A.C. LOPEZ, MARGARET G. BROWN, HELAMAN R. DURAN, IRENE L. DURAN, HENRY B. GARCIA, ROSIE R. GARCIA, ELOY CENTENO, MARGARET THIENPONT, ALINE OYER, MARIE DECOCK, ROBERT CADENA, JOHN MILLER, COMCAL GROUP, J.L. GUERRA, HERMINA L. GUERRA,

PARTIES TO THE PROCEEDING (continued)

CLOTILDE PERSYN, Ind. Exec. of Est. of DARSON H. PERSYN, Dec'd., FRANK PERSYN, HENRY JOE PERSYN, LESLIE ANN PERSYN, LORRAINE STEUBING, LAURA PERSYN, Successors In Title to EMMA PERSYN, Dec'd, SOMERSET ROAD JOINT VENTURE, Acting by and through its members TERRY BRITTON, MARTIN WEISS, and MICHAEL WEISS, MARIE AELVOET, Devisee of REMI AELVOET, RAYMOND WAUTERS, Successor In Title to ALINE WAUTERS, Dec'd, IRMA VERSTUYFT, Ind. Exec. of Est. of GEORGE VERSTUYFT, Dec'd, MICHAEL RAYMOND VERSTUYFT, GARY EDWARD VERSTUYFT, DAVID ALPHONSE VERSTUYFT, RICHARD JOHN VERSTUYFT JULIA LOUISE VERSTUYFT, SHIRLEY P. VERSTUYFT, Successors In Title to RAYMOND VERSTUYFT, Dec'd, EUNICE VERSTUYFT, Indiv. and as Ind. Exec.of Est. of ROBERT VERSTUYFT, Dec'd, EDWARD C. VERSTUYFT, JOHN D. VERSTUYFT, MARIE DURST, MARVIN VERSTUYFT, SHARON ELAINE EISENHAUER, MILDRED BAECKE and ALENE BUYS, As Successors to CLARA VERSCHELDEN, Dec'd, GEORGE BROWN, II, MARY ALICE PONS, RICHARD BROWN, DANIEL BROWN, MARGARET ROSE BROWN, Successors In Title To GEORGE BROWN, Dec'd, Estates of JOE CENTENO, SR., Dec'd and JESUSA CENTENO, Dec'd, Their Devisees and Heirs ELOY CENTENO, LILY CENTENO ALFONSIN, ALICE B. CENTENO LITTLE, CHARLES SALDANA, CARMEN GARCIA and ROLAND NAUMANN, Co-Administrators with Wills Annexed, J.L. GUERRA, JR., Ind. Exec. of Est. of J.L. GUERRA, SR. Dec'd.,

Pursuant to Supreme Court Rule 29.6, 4M Properties, Inc., a Texas corporation, states that it has no parent corporations or subsidiaries.

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OPINIONS BELOW

At the time of transfer from District Court, appeal was taken. *Persyn v. United States,* 935 F.2d 69 (5th Cir. 1991).

Orders have also been reported in this case relative to partial summary judgment, *Persyn v. United States,* 33 Fed.Cl. 579 (1995) (Appendix ["App."] B), and dismissal on the merits, *Persyn v. United States,* 34 Fed.Cl. 187 (1995) (App. C).

The opinion of the Federal Circuit was unreported. Affirmance was noted. *Persyn v. United States,* 106 F.3d 424 (Fed.Cir. 1996) (App. D).

STATEMENT OF JURISDICTION

This is a case initially brought in 1988-89 in the United States District Court for the Western District of Texas under 28 U.S.C. §1346 and §1491 against the United States for a physical taking by overflight in which both the United States and the City of San Antonio ("City") were jointly and severally sued for parallel and concurrent physical and regulatory takings. Over Petitioners' objection, the District Court dismissed the City and transferred the claims against the United States to the Court of Federal Claims. If the Court of Federal Claims has jurisdiction, it is conferred by 28 U.S.C. §1491. Upon appeal to the United States Court of Appeals for the Fifth Circuit, *Persyn v. United States,* 935 F.2d 69 (1991), the Court held that it had no appellate jurisdiction because the order dismissing the City lacked finality. Because of the continuing pendency of the claim against the City, 28 U.S.C. §1500 prohibits the vesting of jurisdiction in the Court of Federal Claims. If it is determined that the Court of Federal Claims had subject matter jurisdiction, the Court of Appeals had jurisdiction to review its orders pursuant to 28 U.S.C. §1295(a)(3).

Under 28 U.S.C. § 1254(1), Petitioners seek review of

the opinion of the United States Court of Appeals for the Federal Circuit and its judgment of December 27, 1996. That judgment affirmed the lower court's grant of partial summary judgment and dismissal on the merits.

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES:

(In Order of Citation In Remainder of Brief)

32 CFR, Part 256 (Air Installation Compatable Use Zones) (App. F)
24 CFR, Part 51, Subpart B (Environmental Criteria) (p. 4 infra)
24 CFR, Part 51, Subpart D (Accident Potential Zones) (App. G)
28 U.S.C. § 1500 (Jurisdiction, Court of Federal Claims) (App. E)
28 U.S.C. § 2409a *et. seq.* (Quiet Title Act), (Point ID, infra)
28 U.S.C. § 1346(f) (Jurisdiction, District Court) (App. H)
28 U.S.C. § 1652 (Rules of Decision Act) (App. I)
U.S. Const. Amend. 5 (Takings Clause) (App. J)

STATEMENT OF THE CASE

Petitioners own 35 tracts of land in the approaches to Kelly Air Force Base, Texas (KAFB). These approaches are termed by the Air Force "Accident Potential Zones" ("APZ's"). Claimants' real estate served runways 15-33 and 14-32 in FYs 1972-73. The tracts to the north of runway 15-33 of KAFB are depicted in *Figure 1,* infra. Those to the south are shown in *Figure 2,* infra. (Large scale ownership maps of the APZ's are in evidence as PX 1 and 2).

Prior to 1975, the only evidence presented as to prior takings is in the government's responses to discovery. (PX 106). Evidence of the gross number of flights in 1966 also appeared (Transcript ["Trans."] 561).

In May 1975, the Air Force published an *Air Installation*

Figure 1
AP2's (North)

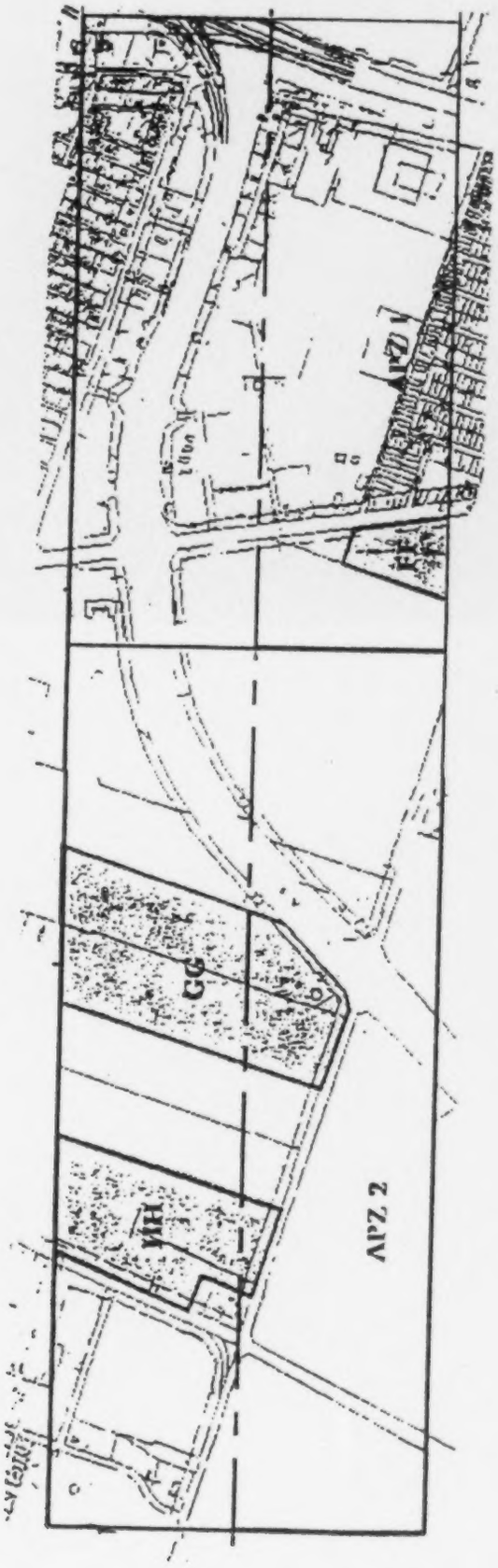
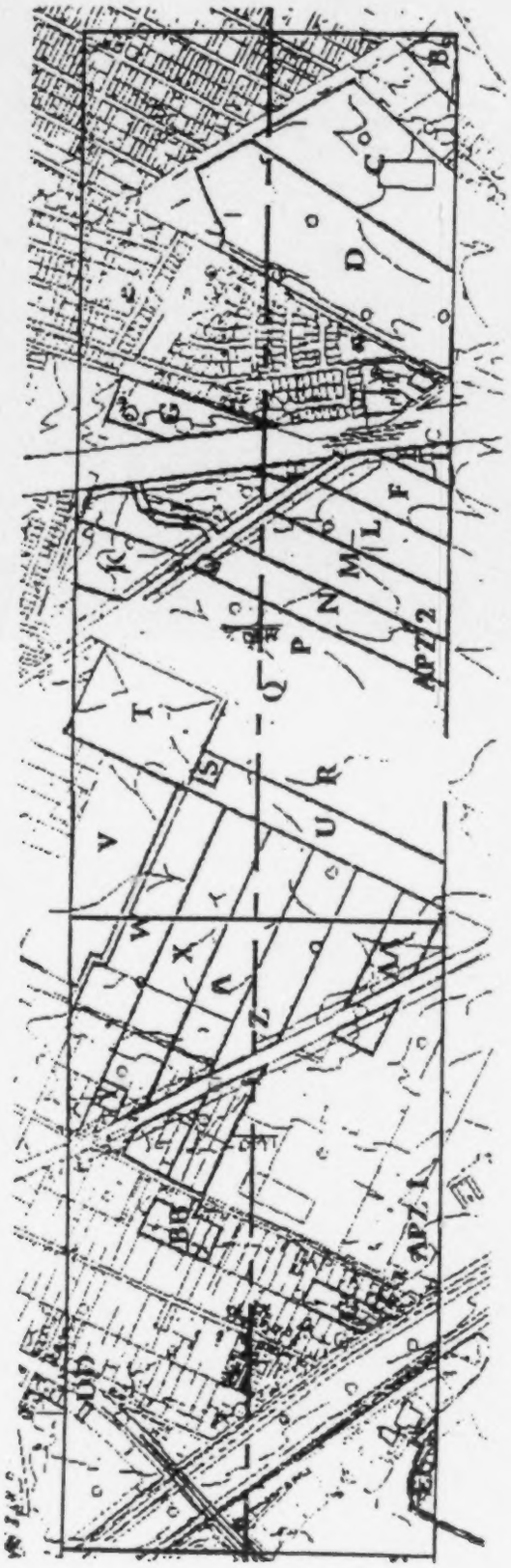


Figure 2
AP2's (South)



Compatable Use Zone Study (AICUZ) (PX 72), based on data gathered in FYs 1972-73. Decibel contours (measured in "Day/Night Average Sound Level [Mathematical]," or "Ldn,") were determined and mapped at 65, 70, 75 and 80+ Ldn. For purposes of comparison, the 65 Ldn area for FYs 1972-73 will be quantified as 100%. The AICUZ study took into account two factors: noise and accident potential hazard. *Figure 3,* infra (PX 72, PX 98), shows noise contours from that study. With one exception, all of Plaintiffs' land was within the 60 to 75 Ldn contours. (PX 98). These contours were of public record in the FHA office in San Antonio (PX 112, Trans. 191-193).

It will be noted that from FY 1955 through FY 1985, there were two active runways at KAFB, 14-32 and 15-33 (PX 72, PX 98).

The APZ's for runway 15-33, previously limited by the 65 Ldn contour were expanded by Department of Defense ("DOD") regulation 32 CFR, Part 256 "Air Installation Compatable Use Zones" in 1977. The expanded APZ's are shown on *Figure 4,* infra (PX 8, PX 98).

The government claims a regulatory taking of a hazard easement by the promulgation of this regulation. (PX 106, Trans. 224-225).

On July 12, 1979, the United States Department of Housing and Urban Development ("HUD") promulgated 24 CFR, Part 51 § 51.103. For purposes of community block grants of appropriated funds and the financing of new residential construction, the following standards were adopted (measured in Ldn):

SITE ACCEPTABILITY STANDARDS (Footnotes omitted)

Day-night average sound level (in decibels)	Special approvals and requirements

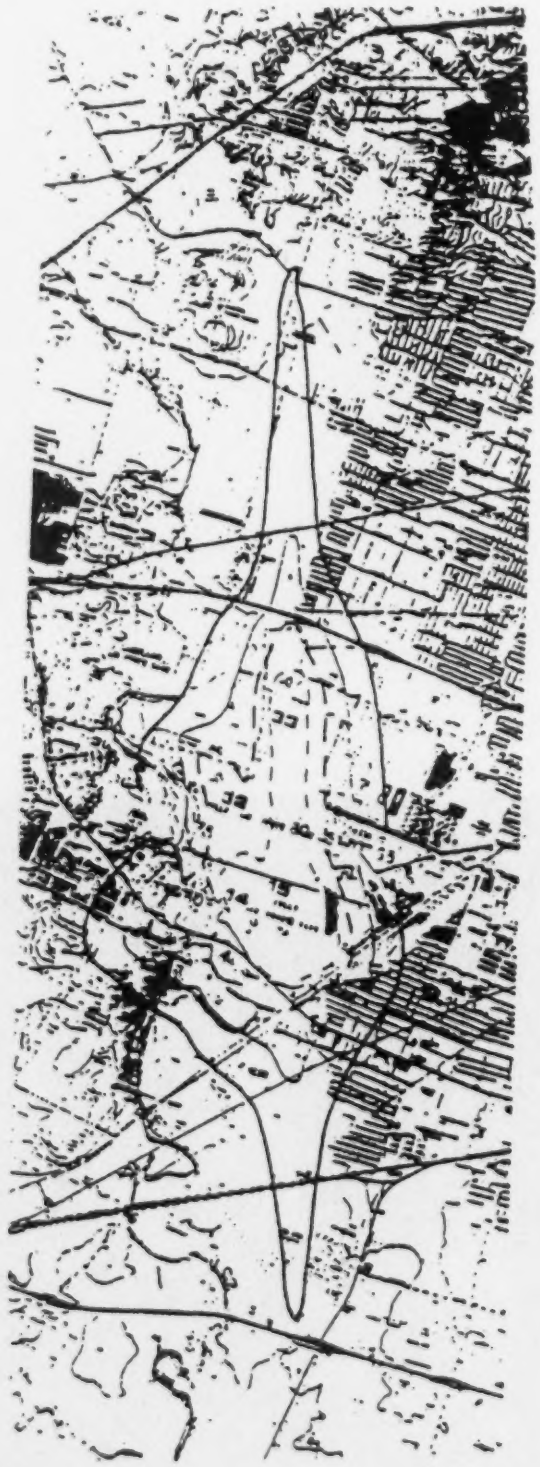


Figure 3
1975 AICUZ Study Sound Contours

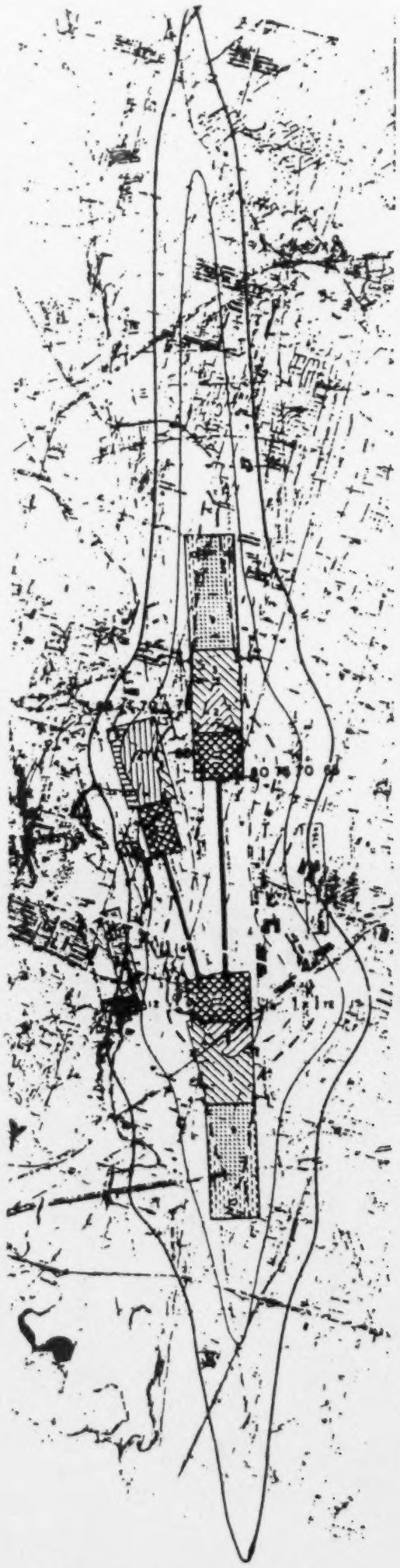


Figure 4
1981 AICUZ Study Sound Contours

Acceptable	-Not exceeding 65 db	-None
Normally Unacceptable	-Above 65 but not exceeding 75 db	-Special Approvals -Environmental Review -Attenuation
Unacceptable	-Above 75 db	-Special Approvals -Environmental Review -Attenuation

According to the AICUZ study published by the Air Force in November 1981 using FY 1979 data, the 65 Ldn area had increased by 185%, or to 285% of the 1975 level (PX 8). As noted, "With the arrival of F-4 Fighter aircraft, the 65-70 Ldn noise level was extended 5.2 miles northward through Leon Valley city limits and 3.2 miles southwest into Bexar County." The sound contours mapped in the 1981 study are shown on *Figure 4*, supra (PX 98).

The Environmental Protection Agency and the Departments of Transportation, HUD and DOD established and published uniform "*Guidelines for Considering Noise And Land Use, Planning And Control*" (Gov. Printing Off. 1980). They made the following findings:

NOISE ZONE CLASSIFICATION

Noise Zone	Noise Exposure Class	*Noise Descriptor* DNL Day-Night Average Sound Level	HUD Noise Standards
A	Minimal Exposure	Not Exceeding 55	"Acceptable"
B	Moderate Exposure	Above 55 but Not Exceeding 65	

		Above 65	
C-1		Not Exceeding 70	
——	Significant	——————	"Normally
	Exposure		Unacceptable
C-2		Above 70 but	
		Not Exceeding 75	
		Above 75 but	
D-1		Not Exceeding 80	
	Severe	Above 80 but	
D-2	Exposure	Not Exceeding 85	"Unaccceptable"
D-3		Above 85	

Another AICUZ study was carried out for FY 1983. It once again showed significant expansion of noise levels (PX 113 c & d).

HUD published a new regulation, 24 CFR, Part D, dated January 6, 1984 (App. G). The regulation is applicable to the clear zones of civilian airports and to the clear zones *and* APZ's of military airfields. It is *not* applicable to the approaches to civilian airports.

Section 51.303 adopted the provisions of the DOD AICUZ regulation 24 CFR, Part 51, *supra.* The HUD regulation imposes severe restrictions upon all types of federally funded, assisted or insured development and limits usages to those specified by the DOD regulation.

An "Environmental Assessment For Proposed Mission Changes at Kelly Air Force Base, Texas," dated January 1984 evaluated the future basing at KAFB of C5A aircraft, a much larger and noisier jet transport replacing the C-130 turboprop transport (DX 5). Projected sound-contours for FY 1985, reflecting the C5A activation are shown in *Figures 5 and 6,* infra (PX 113e and 113f). These official Air Force findings were furnished to Plaintiffs by Defendant as discovery and were admitted into evidence. (Trans. 249)

After the C5A stationing, contour level 80 covered the majority of Plaintiffs' land. Contour levels 75-80 covered the remainder, except for a small sliver of land in the northeast corner of APZ 2 (North).

As scheduled, the stationing of C5A jet transports at KAFB began in 1984. Plaintiff Clotilde Persyn (Parcel A) testified that the aircraft has a unique ". . .whine and it goes clean through you (Trans. 107-108)." It was impossible to carry on normal telephone conversations. Television listening was impaired. Its landing lights ". . .lights up your bedroom at night. Sleeping at night is difficult (Trans. 106-107)."

Plaintiff Amadeo Lopez (Parcel BB) stated that the flights were so low that he ". . .could see the nuts and bolts on it right overhead." His elderly mother was adversely affected, "She cries, sir. She cried." Personal or telephone conversation was impossible (Trans. 62-66).

"I live under the aircraft and C-5A emits, puts out, a loud whine and its very deafening to my ears. . ." was the testimony of Patricia Verstuyft (Parcel S). Her land was not suitable for human habitation (Trans. 266).

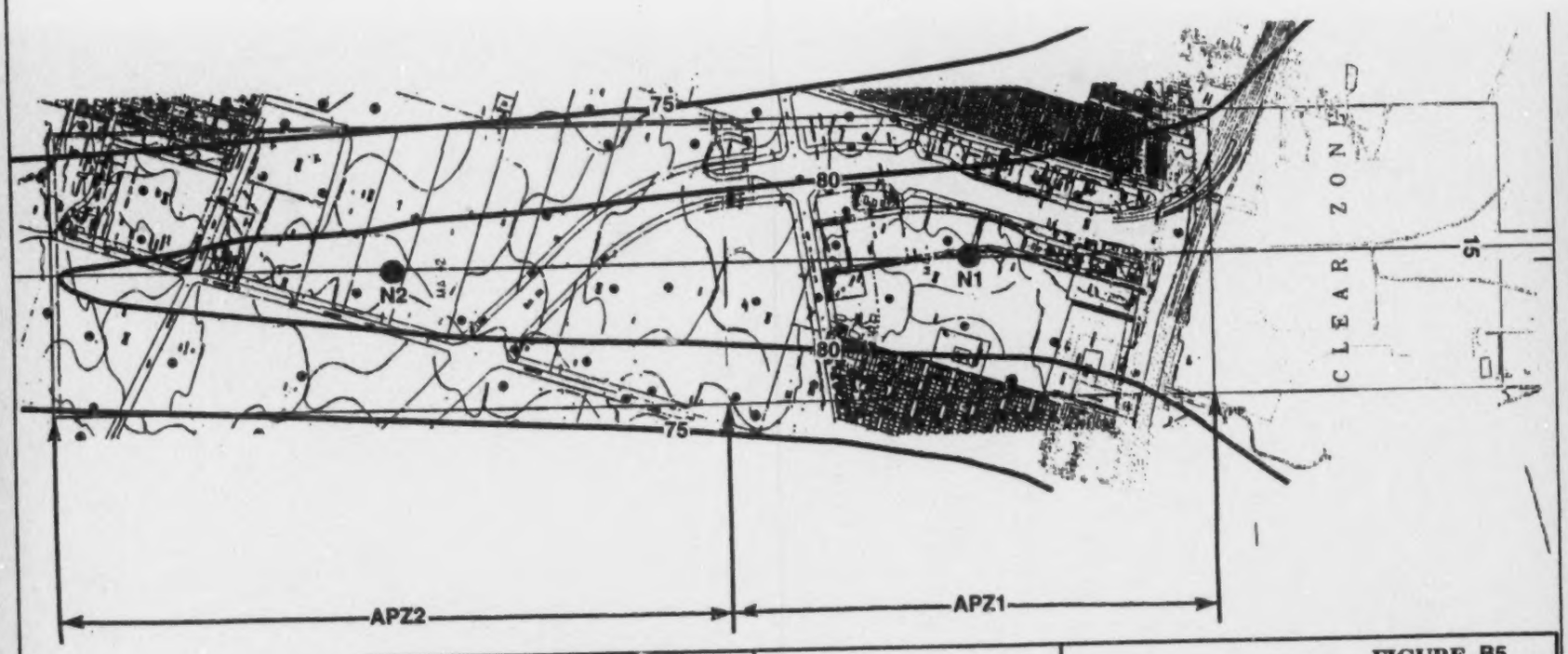
Aircraft on instrument landing enter APZ 2 (South) at 786.12' above ground level (AGL) (3° glide slope), enter APZ 1 (South) at 419.26' AGL and leave APZ 1 (South) at 157.22' AGL. (PX 8, PX 105, Trans. 456-458). Those approaching from the north (2-1/2° glide slope) fly at lower levels.

The element of interference with surface usage need not be further detailed from the testimony of the Plaintiffs. The trial court itself stated in that respect all that needs to be said (Trans. 566):

> The court does believe that without significant noise abatement, much of plaintiffs' properties are virtully uninhabitable.

AIRCRAFT NOISE EXPOSURE KELLY AFB	SCALE IN FEET 0 1000 2000 N	FIGURE B6
DATE: October 1993		Ldn CONTOURS PREPARED BY AIR FORCE AICUZ UNIT - 1985 SOUTH OF RUNWAY 15/33

Figure 5



AIRCRAFT NOISE EXPOSURE KELLY AFB	SCALE IN FEET 0 1000 2000 N	FIGURE B5
DATE: October 1993		Ldn CONTOURS PREPARED BY AIR FORCE AICUZ UNIT - 1985 NORTH OF RUNWAY 15/33

Figure 6

Runway 14-32 was closed in 1985 (Trans. 463-464). All traffic was diverted onto runway 15-33 which undoubtedly contributed to the exceptionally high levels of noise to prevail in that year.

Between 1984 and 1986, the Air Force conducted a well-publicized campaign to alert the public to the menance of noise and crash hazards in the APZ's (Trans. 116-124, 163-168). It was stipulated that "these meetings did occur, that the AICUZ studies were handed out, and that the Air Force did what it was supposed to do, which was make people aware, publicize the fact that it was going to happen. . . and there was newspaper and television coverage of the events." (Trans. 166-168). Approximately 22 such meetings occurred (Trans. 267).

In granting summary judgment that municipal land use regulations cannot be imputed to the United States, the trial court noted (App. 7):

> In August 1985 the Air Force presented the Mayor, the City Planner, the City Manager and the City Attorney of San Antonio with a formal briefing on the AICUZ study. The Mayor subsequently held public hearings on the Air Force's recommended zoning. The Air Force attended these hearings and recommended that zoning should be changed to conform to the AICUZ concept. On April 17, 1986, the City passsed a zoning ordinance that conformed with AICUZ restrictions, although it did not contain recommended noise attenuation measures.

As this is a bifurcated trial, damages to each tract were to be established in a subsequent hearing. All that Plaintiffs had to prove at this phase was that as a consequence of Defendant's permanent physical intrusions, each of Plaintiffs' tracts sustained some damage. Testimony to that effect is in the record (Trans. 283-285).

From 1987 through 1995, with the exception of the

transfer of land with pre-existing structures, there were no sales of land in the 2.5 square miles within the APZ's. This is quite remarkable for such a large body of land completely within the San Antonio city limits. The market was completely frozen, or, as one witness put it, "dead as a doornail." (Trans. 288).

Like a frost-bitten extremity, the extent of damage could not be fully ascertained until thawed. Two land sales did finally occur in 1995 within the far north and south ends of the APZ's. When paired with pre-taking sales of the same land, a dramatic loss of value is obvious:

A. In 1984, parcel HH, owned by Plaintiffs Cadena and Miller, was under valid contract of sale with earnest money to the Mexican American Unity Council (MAUC) for $1.50 per square foot or $65,340 per acre. In October 1985, because of the expenses of soundproofing and the legal and political turmoil over the APZ's, MAUC declined to consumate the transaction, as was its right (Trans. 348-352). The land was foreclosed. It last sold for $6,004.00 per acre in 1995, a loss in value of 90.7% (Trans. 406). If adjusted for the period of its dormancy to a 1986 value at 6% per annum, the 1986 value is $3,554.00 per acre or a loss of 94.4%.

B. In 1984, Parcel D was purchased by Plaintiff Raul Jimenez, Sr. for $7,273.00 per acre. It, too, was forclosed. The same tract sold in January 1995 for $1,200.00 per acre, a loss of 83.5%. (Trans. 395-396). If adjusted for the period of its dormancy to a 1986 value at 6% per annum, the 1986 value is $710.00 per acre or a loss of 90.2%.

Since 1986, four of Plaintiffs' 35 parcels have been foreclosed. Of the remaining 31, 12 have passed by devise or descent. Short of foreclosure, death, donation, or sale at donative prices there is no manner in which the landowners can rid themselves of this worthless real estate.

Other facts will be set forth in the Points to which they

relate.

REASONS FOR GRANTING THE WRIT

I.

BECAUSE OF THE PENDENCY IN THE DISTRICT COURT OF AN ACTION AGAINST A CO-CONDEMNOR, THE CITY OF SAN ANTONIO, THE COURT OF FEDERAL CLAIMS DID NOT ACQUIRE SUBJECT MATTER JURISDICTION; A REMAND TO DISTRICT COURT IS REQUIRED:

A. PLAINTIFFS' INDIVISIBLE CAUSE OF ACTION IN THE DISTRICT COURT WAS AGAINST THE UNITED STATES AND THE CITY FOR A JOINT TAKING FOR WHICH BOTH CONDEMNORS ARE LIABLE.

B. THE PROHIBITION OF 28 U.S.C. §1500 APPLIES WHEN PLAINTIFFS PLEAD THAT CITY WAS "ACTING. . .UNDER THE AUTHORITY OF THE UNITED STATES. . ."

C. JURISDICTION OVER THE CITY WAS RETAINED IN THE DISTRICT COURT AND NOW PENDS IN THE FIFTH CIRCUIT.

D. THE DISTRICT COURT HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ALLEGED PRIOR TAKINGS BY THE UNITED STATES UNDER 28 U.S.C. §2409a *ET. SEQ.* AND 28 U.S.C. § 1346(f).

An understanding of the substantive law of prescriptive easements and of progressive takings is essential to determination of jurisdictional questions. Points II and III are thus incorporated herein by reference.

A. PLAINTIFFS' INDIVISIBLE CAUSE OF

ACTION IN THE DISTRICT COURT WAS AGAINST THE UNITED STATES AND THE CITY FOR A JOINT TAKING FOR WHICH BOTH CONDEMNORS ARE LIABLE.

Erroneously, the trial court and Federal Circuit overlooked the Fifth Circuit's prior adjudication that the landowners' cause of action for a joint taking by the United States and the City of San Antonio is a single cause of action which cannot be arbitrarily split into federal and municipal components. In *Persyn v. United States,* 935 F.2d 69 (5th Cir. 1991) it held:

> For safety purposes, San Antonio requires clear zones 3000 feet in length and width at the ends of military airport runways located within its jurisdiction. In 1986, the Air Force requested the establishment of two military supplementary overlay zoning districts around Kelly Air Force Base as an additional safety precaution. The City passed Ordinance 62739-A creating these special districts extending beyond the existing 3000 feet clear zones. Zone 1 extended 5000 feet beyond the clear zone and Zone 2 extended 7000 feet beyond Zone 1, San Antonio, Tex. Code, § 35-222 (April 17, 1986). The ordinance imposed restrictions on the use of all land located within the overlay districts. Two additional ordinances passed during the next year, 64225 and 64961, refined and amended the use restrictions. The ordinances and their ultimate effect on property values near the base are the *basis for a portion of the landowners' claims of a taking of their property.* (935 F.2d 70-71). . .
>
> The dismissal is also not appealable under the collateral order doctrine. *Although the order finally disposes of the landowners' claims against the City, the issue involved is not separate from the claims against the United States.* (Citing authorities) (Emphasis added 935 F.2d 74).

Defendant did not file a petition for certiorari in the United States Supreme Court.

B. THE PROHIBITION OF 28 U.S.C. §1500 APPLIES WHEN PLAINTIFFS PLEAD THAT CITY WAS "ACTING. . .UNDER THE AUTHORITY OF THE UNITED STATES. . ."

In the District Court, Plaintiffs alleged in their First Amended Complaint, p. 3:

> 11. At all times relevant hereto, the United States was acting by and through the City and the City was acting directly or indirectly under the authority of the United States and for the sole and exclusive benefit of the United States.

There is no jurisdiction by Petitioners' consent. Both the landowners and the government have consistently asserted the absence of jurisdiction because of 28 U.S.C. §1500. Landowners timely moved for remand under that section.

The trial court states that "In July 1992, Plaintiffs filed their first amended complaint . . .specifically invoking the jurisdiction of this court (App. 2)" As the Court of Federal Claims record reveals, quite the opposite is true (First Amended Complaint, 2-3):

Plea to the Jurisdiction

> 1. The United States District Court for the Western District of Texas has subject matter jurisdiction over this case under the statues of the United States, including 29 U.S.C. §1331. . .
>
> 5. Within the meaning of 28 U.S.C. § 1500, Plaintiffs have pending in the United States District Court for the Western District of Texas claims against

the City of San Antonio, Texas, which municipality was "acting or professing to act, directly or indirectly under the authority of the United States" relative to the matters alleged herein.

Alternative Jurisdiction of Claims Court

6. Subject to Landowners' Plea to the Jurisdiction above stated and the overruling thereof by this Court, Landowners state, in the alternative, the jurisdiction of the Claims Court under the provisions of 28 U.S.C. § 1491 (a)(1) et seq.

To which the government duly replied in its "Answer to First Amended Complaint" (p. 1):

Defendant United States answers the complaint of plaintiffs as follows.

1. The allegations of paragraph 1 are denied...

5. The allegations of paragraph 5 are admitted.

6. The allegations of paragraph 6 are conclusions of law to which no response is required. *To the extent an answer is required, the allegations of paragraph 6 are denied.* (Emphasis added).

The applicability of §1500 is determined by the parties' pleadings, *Dico Inc. v. United States,* 48 F.3d 1199, 1203-4 (Fed. Cir. 1995).

C. JURISDICTION OVER THE CITY WAS RETAINED IN THE DISTRICT COURT AND IS NOW PENDING IN THE FIFTH CIRCUIT.

The trial court's conclusion that the attempted dismissal of the City was a "final order" permitting the vesting of jurisdiction in the Court of Federal Claims (App.

3-4) is diametrically contrary to the Fifth Circuit's adjudication in *Persyn, supra.*

Conclusion

> We do not have appellate jurisdiction to review the district court's order transferring the landowners' claims against the United States to the Claims Court. The appeal of the court's order dismissing the claims against the City of San Antonio is premature. The appeal from the latter order must await the decision of the Court of Claims involving the asserted right to a remand to the district court of the claim against the United States. Accordingly, we dismiss the landowners' appeal of the two orders of the district court. (935 F. 2d 74-75).

No authority was cited, nor can any be cited, for the trial court's reasoning "... Although the district court's order transferring the case and dismissing the city was non-final for appeal purposes, the claim against the city did not remain behind like so much lost luggage in the district court.' (App. 4)

If the claim against the City did not "remain behind," where did it go?

The answer is that the joint claim against the City was pending in the District Court until January 24, 1997. On that date, notice of appeal was given. The claim now has been docketed and pends as cause No. 97-50108, *Persyn v. United States,* in the United States Court of Appeals for the Fifth Circuit.

D. THE DISTRICT COURT HAS EXCLUSIVE ORIGINAL JURISDICTION OVER ALLEGED PRIOR TAKINGS BY THE UNITED STATES UNDER 28 U.S.C. 2409a *ET SEQ.* AND 28 U.S.C. 1346(f).

As is apparent from the previous point, the Court of Federal Claims is without jurisdiction. The question then arises: Should this cause be dismissed or remanded?

From the pleadings, discovery and evidence, there is another separate and distinct reason why it must be remanded. By claiming the prior taking of avigation easements in Petitioners' realty, the government has raised questions of law and fact within the exclusive original jurisdiction of the District Court under the provisions of the "Quiet Title Act," 28 U.S.C. § 2409a, *et seq.*

The statute, enacted by Congress in 1972, provides, in relevant part:

> (b) The United States shall not be disturbed in possession or control of any real property involved in any action under this section pending a final judgment or decree, the conclusion of any appeal therefrom, and sixty days; and if the final determination shall be adverse to the United States, the United States nevertheless may retain such possesssion of control of the real property or of any part thereof as it may elect, upon payment to the person determined to be entitled thereto of an amount which upon such election the district court in the same action shall determine to be just compensation for such possession or control. . .
>
> (e) If the United States disclaims all interest in the real property or interest therein adverse to the plaintiff at any time prior to the actual commencement of the trial, which disclaimer is confirmed by order of the court, the jurisdiction of the district court shall cease unless it has jurisdiction of the civil action or suit on ground other than and independent of the authority conferred by section 1346(f) of this title. . .

Thus, the applicable federal statute of limitations for prior takings in this case is not six years. Congress provided:

in §(g):

> (g) Any civil action under this section,. . . shall be barred unless it is commenced within *twelve years* of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest *knew or should have known* of the claim of the United States. (Emphasis added.)

The burden of proof that the landowners knew or should have known of the Air Force's recently asserted claims of prior takings is upon the government. No such evience was forthcoming at trial.

No assertion of the existence of prior takings of prescriptive easements by the government was raised in the initial proceedings in the District Court. The District Court granted the Defendant's motion under Rule 12a, F.R.C.P. The government was not required to answer.

Prior takings of easements were first asserted in 1992 by the government in the Court of Federal Claims (Answer to Second Amended Complaint, 3-4):

> . . .Defendant affirmatively alleges that, although Air Force planes fly below 500 and 1,000 foot minimum height restrictions during take-offs and landings at Kelly AFB, all such flights are within existing avigation easements held by defendant and do not intrude on any of the plaintiffs property rights. . .

A set of interrogatories addressed, in relevant part, to the elements of these "existing avigation easements" was fruitless. The Air Force refused to answer. Additional interrogtories, more narrowly framed, went unanswered until the trial court compelled response (Order, filed October 26, 1993). The gvernment's response was received in evidence as Plaintiffs' Exhibit 106 (Trans. 224-5).

The government was first given the oportunity to disclaim any "Preexisting easement(s) that Defendant will claim supporting a statute of limitations defense obtained under Federal law" (Plaintiffs' Second Request for Admissions to Defendant, pp. 1-2). From January 1, 1942 through December 31, 1949, the Air Force disclaimed easement acquisition. It refused to disclaim acquisition of easements by operation of the statute of limitations in each of four separate periods: 1950-59, 1960-69, 1970-79, and 1980-89. (Defendant's Response to Plaintiffs' Second Request For Admissions, pp. 1-2).

Petitioners propounded their "Plaintiffs' Second Set of Interrogatories" (pp. 1-2) addressing ten specific questions to the elements of ". . .each avigation, noise, crash hazard, or other type of easement claimed by Defendant against Plaintiffs' properties. . ." The "Defendant's Response To Plaintiffs' Second Set of Interrogatories" (pp. 2-7) is, to put it mildly, rambling and vague. Identifiable segments of claims of prescriptive easements include:

A. Easements acquired "sometime prior to 1917. . . from Wright Flyer airplanes. . ." (p. 5).

B. "Increases and expansions" of easements ". . . since 1917. . ." (p. 5).

C. ". . .(F)light pattern configuation parameters of avigation easements on property in the vacinity of Kelly AFB including Plaintiffs' properties . . .In approximately 1955 . . ." (pp. 5-6).

D. "The maximum parameters of noise and safety hazard servitude of the avigation easements over plaintiffs' properties were reached in 1964. The level of operations, the noise contours, and the recommendations for land use of affected properties are all contained in the Report dated November 1993. The Report dated November1993 similarly details the reduced levels of operations, noise, and safety

hazards subsequent to 1964." (p. 6).

E. "The existing usages of the plaintiffs' properties which are subordinate to the existing avigation easements in all of their parameters at any given time are within the knowledge of plaintiffs." (p. 6).

The one easement which is identifiable from the answers with reasonable certainly is a regulatory taking which the Air Force claims occurred in 1977 (pp. 6-7):

> The three safety zones at each end of the runways of Kelly AFB were established (along with safety zones adjacent to all other military air fields in the United States) by notice filed in the Federal Register, 42 Fed. Reg. 773, on January 4, 1977, and codified in 32 C.F.R. Part 256. This notice and regulation related to pre-existing safety hazards connected with military air fields in general and Kelly AFB in particular.

Subsequently, Respondent moved for summary judgment on the easements claimed to be delineated in the November 1993 report (Defendant's Motion for Summary Judgment, Exhibit W). Summary judgment was denied. (App. 8-11).

Each of these claimed easements, whether prescriptive or regulatory, impeaches and clouds the landowners' record titles. The government refuses to disclaim them. Each is thus within the exclusive original jurisdiction of the District Court and may result in the payment of compensation to the landowners.

II.

TO ASSERT A PERMANENT AVIGATION EASEMENT AGAINST UNDERLYING OWNERS, PERFECTION OF A PRESCRITIVE EASEMENT UNDER TEXAS LAW OVER A PERIOD OF TEN YEARS IS REQUIRED.

The controlling rule in Texas and many other jurisdictions is concisely summarized in *Tarrant County Water Control and Imp. Dist. No. 1 v. Fowler,* 175 S.W.2d 694, 700 (Tex. Civ. App. - Dallas 1943, writ ref'd for want of merit, 142 Tex. 375, 179 S.W. 2d 250 [1944]):

> Appellee's claim would not have been barred short of the period necessary to acquire lands by adverse possession, that is, ten years in this state. . . The conclusion just announced, in our opinion, is amply supported; the rule deduced from the weight of applicable authorities is stated in 18 Am.Jur. Sec. 394, P. 1042, as follows: ". . .On the other hand, it is held that where the Constitution requires compensation first to be paid before an owner's land is taken, the burden of prosecuting his claim for compensation cannot be placed on the owner prior to the running of the prescriptive period. . . ."

See also *Waddy v. City of Houston,* 834 S.W.2d 97, 102-3 (Tex. App. - Houston [1st Dist.] 1992, writ denied) and authorities cited therein.

This Court adopted this constitutional precept as to the inverse federal taking considered in *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed 336 (1947):

> Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, *as between private parties, a servitude has been acquired either by agreement or in course of time.* (Emphasis added).

Under the authority of *Erie R.R. Co. v. Tompkins,* 304 U.S. 64, 72-73, 58 S.Ct. 817, 82 L.Ed 1188 (1938) and the Rules of Decision Act, 28 U.S.C. §1652, the law to apply is that of Texas.

The Federal Circuit arbitrarily applies the six year limitations statute of the Court of Federal Claims. Its holding and the parallel decisions of the 2nd, 3rd and 7th Circuits are

a quagmire of confusion, inconsistency and conflict. As noted in *287 Corporate Center Associates v. Town of Bridgewater,* 101 F.3d 321, 324 (3d Cir. 1996):

> 2. Fifth Amendment to the United States Constitution
>
> Associates also brought suit under the Fifth Amendment. Following *Wilson v. Garcia,* some Courts of Appeals, for purposes of consistency, have applied the personal injury statute of limitations to actions brought directly under the Constitution, Sec. e.g. *Bieneman v. City of Chicago,* 864 F.2d 463, 469-70 (7th Cir. 1988) (action brought directly under 5th Amendment), *cert. denied,* 490 U.S. 1080, 109 S.Ct. 2099, 2100, 104 L.Ed 2d 661 (1989); *Chin v. Bowen,* 833 F.2d 21 (2d Cir. 1987) (action brought directly under 14th Amendment).
>
> Assocites contends, however, that we should ignore *Wilson* and instead apply the most analogous state statute of limitations, N.J. St. Ann. § 2A:14-7, which provides, "Every action at law for real estate shall be commenced within 20 years next after the right or title thereto, or cause of such action shall have accrued." But in New Jersey, the most analogous state statute provides a six year limitations period. See N.J. Stat. Ann. § 2A:14-1. Although the statute does not explicitly reference inverse condemnation actions, New Jersey decisional law indicates it is the proper statute of limitations in such cases (Citing authorities). . .

The Supreme Court should use the case at bar to enunciate a single and logical rule of limitations for Fifth Amendment inverse takings.

The trial court erroneously cites from authorities involving only a temporary easement or non-permanent damages. *Creppel v. United States,* 41 F.3d 627 (Fed.Cir. 1994) draws a sharp line between temporary easements and permanent takings. A prior temporary taking may be barred by limitations while a current one is not.

III.

THE FACTS OF THIS CASE SHOW AN INCREMENTAL AND PROGRESSIVE PHYSICAL AND REGULATORY TAKING WHICH PRECLUDED THE ACCRUAL OF PLAINTIFFS' CAUSE OF ACTION UNTIL THE TAKING HAD "STABILIZED":

A. THERE WAS A PHYSICAL TAKING BY NOISE, CRASH HAZARD & LOW FLIGHT.

B. REGULATORY TAKING OCCURRED BY DEPRIVATION OF FEDERAL FUNDS AND FINANCING AND FEDERAL PROCURAL OF MUNICIPAL LAND RESTRICTIONS.

C. ACCRUAL OF THE CAUSE OF ACTION OCCURRED AT THE TIME OF "STABILIZATION."

In this case, ever-increasing federal physical intrusions have been paralleled and compounded by continuously more stringent federally proclaimed and federally procured regulations. In military terms, this is called a "double envelopment."

A. THERE WAS A PHYSICAL TAKING BY NOISE, CRASH HAZARD & LOW FLIGHT.

The leading authority for the taking of an avigation easement by noise and crash hazard is an opinion of the Supreme Court of the United States. In *Griggs v. County of Alleghany,* 369 U.S. 82, 85, 87 S. Ct. 531, 532, 8 L.Ed.2d 916 (1962). After detailing the evidence of noise, crash hazard, and low flight, Justice Douglas concluded:

> The glide path for the northeast runway is as necessary for the operation of the airport as a surface right of way for operation of a bridge, or as is the land for the operation of a dam (Citing authorities)... Without the "approach areas," an airport is indeed not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by constitutional standards it did not acquire enough.

A federally proclaimed Accident Potential Zone is, by

definition, an impact zone. In *Portsmouth Harbor Land and Hotel Co. v. United States,* 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 387 (1922), the Supreme Court found a taking by the placement of shore batteries to fire across the condemnee's land.

Compensation has also been mandated for the creation of a *de facto* federal impact zone. In *Eyherabide v. United States,* 345 F.2d 565, 567 (Ct.Cl. 1965), Plaintiffs' land was bounded on three sides by an artillery target area. The Court held:

> The interference with use of possession may be so substantial and of such a character that it cannot be done without compensation under the Federal Government's regulatory and executive powers. When these factors exist, a constitutional taking is implied, it is assumed that the United States has acquired a definite interest in the property, permanent or temporary, such as a fee title, an easement, a servitude, or a lease-hold.

As admitted by the Air Force, supra Point ID, and shown by DX 23b and DX 24b, government aircraft frequently and regularly fly below legal minimum altitude.

B. REGULATORY TAKING OCCURRED BY DEPRIVATION OF FEDERAL FUNDS AND FINANCING AND BY FEDERALLY PROCURED MUNICIPAL LAND RESTRICTIONS.

As *Eyheribide,* supra, states, regulatory actions may be considered along with physical intrusions. In the case at bar, the Defendant (1) proclaimed the AICUZ regulation in 1977, which it claims as an easement *per se,* (2) expanded the AICUZ regulation by incorporating it into a HUD regulation in 1984 denying federal funds or financing to the APZ's and (3) in 1986 procured municipal overlay and zoning ordinances as mandated in the AICUZ regulation. (App. F, § 256.4[2])

C. ACCRUAL OF THE CAUSE OF ACTION OCCURRED AT THE TIME OF "STABILIZATION."

The existing law in the Court of Appeals for the Federal Circuit, and, therefore, in the Court of Federal Claims, is comprehensively articulated by *Applegate v. United States,* 25 F.3d 1579, 1580 (Fed. Cir. 1994). Extensive quotation is in order:

> . . . Because the landowners' claim did not accrue more than six years before its filing, this court reverses and remands for further proceedings. . .
>
> Therefore, this court's review of the trial court's action depends upon when this alleged taking accrued. The Supreme Court set forth the standard for accrual in cases alleging takings of a continual nature. *United States v. Dickinson,* 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789 (1947).
>
> On this basis, the Supreme Court clarified: "The Government. . .left the taking to physical events, thereby putting on the owner the onus of determining the decisive moment in [an onging] process of acquisition by the United States when the fact of taking could no longer be in controversy." Id. at 748, 67 S.Ct. at 1384. Under these circumstances, the Supreme Court explained that the claimant can postpone filing a suit "until the [continuing taking] situation becomes stabilized." Id. at 749, 67 S.Ct. at 1385. In other words, the Supreme Court reiterated that the owner may wait until "the consequences of inundation have so manifested themselves that a final account may be struck." Id. Moreover, *Dickinson* discouraged a strict application of accrual principles in unique cases involving Fifth Amendment takings by continuous physical processes. *Dickinson,* 331 U.S. at 749, 67 S.Ct. at 1385.
>
> *This court's predecessor, the United States Court of Claims, applied the Dickinson doctrine. See e.g. Castro v. Unied States,* 205 Ct.Cl. 534, 500 F.2d 436, 440 (1974).

The Federal Circuit's reliance upon *Castro v. United States,* supra, is especially significant. The *Castro* Court held at 500 F.2d 436:

The *Dickinson* rule has been applied by this court in other situations...

> *The same rule has been applied in cases involving avigation easement where the impairment of land use by overflights was progressive and its frequency and seriousness were not fully ascertainable until a period of years had elapsed. Avery v. United States, 330 F.2d 640, 165 Ct. Cl. 357, (1964); Aaron v. United States 311 F.2d 798, 160 Ct. Cl. 295 (1963) and 340 F.2d 655, 167 Ct. Cl. 818 (1964), and Klein v. United States, 152 Ct. Cl. 221 (1961), cert. denied, 366 U.S. 936, 81 S.Ct. 1661, 6 L.Ed. 2d 847 (1961).*

The recent *Associates* decision, *supra*, of the Third Circuit discusses deferred accrual of a cause of action under the Fifth Amendment:

> Associates contends the taking of its property amounts to a "continuing wrong," which effectively tolls the statute of limitations. We have held that under proper circumstances, the "continuing wrong" doctrine may apply:
>
> > In most federal causes of action, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuing practice falls within the limitations period. . .
>
> *Brenner v. Local 514, United Bhd. of Carpenters and Joiners of Am.*, 927 F.2d 1283, 1295 (3d Cir. 1991). The focus is on the defendant's "affirmative act[s]." Id. at 1296.
>
> The Township has not committed an affirmative act since 1985. The facts of the alleged taking stabilized almost ten years before Associates filed its lawsuit. Associates is unable to allege facts which might bring it under the "continuing wrong" doctrine. See *United States v. Dickinson*, 331 U.S. 745, 749, 67 S.Ct. 1382, 1385, 91 L.Ed. 1789 (1947) (holding that a landowner may "postpon[e] suit until the situation becomes stabilized.").

Noise Levels at Specific Point: N1
Kelly AFB

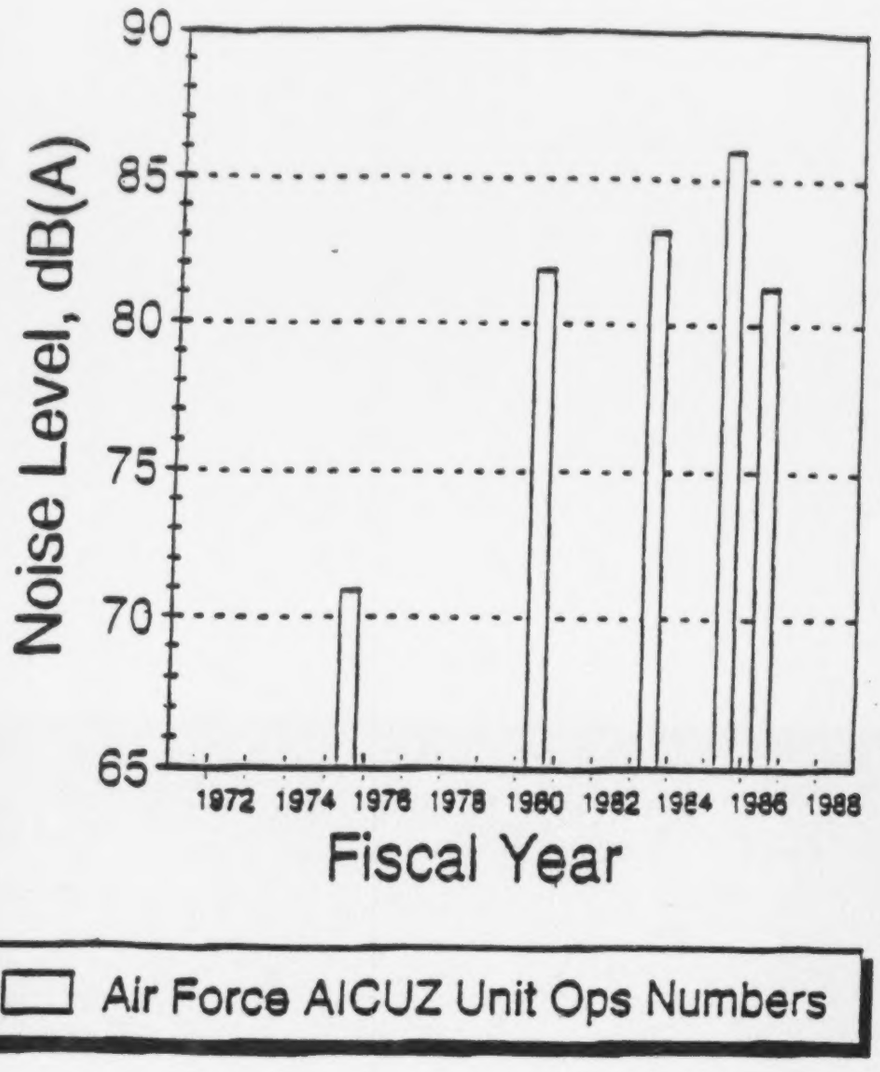


Figure 7

The following graph, *Figure 7,* for Point N1 is an extract from the evidence (PX 104). The other points N2, S1 and S2 are substantially identical. It is taken from discovery received from, prepared by, and admitted by the Air Force. It shows a very steady *progression* from FY 1975 through FY 1985, *stabilization* in 1985 and a *decline* in FY 1986.

FIGURE 7

It should be noted that Ldn is a logarithmic scale. (PX 8). A sound level of 75 is ten times greater than 65 and 85 is ten times greater than 75. Thus, 85 is 100 times as great as 65.

The noise levels reported for 1980 reflect the introduction of the noisier F4C fighter aircraft. Those in 1985 show the escalation in noise from the stationing of the giant C5A transport. In 1986, the quieter F-16 Fighter began replacing the F4C (DX 6).

Reliance upon *Hero Lands Co. v. United States,* 1 Cl.Ct. 102, aff'd, 727 F.2d 1118 (Fed. Cir. 1983), cert. denied, 446 U.S. 972 (1984) and similar cases (App. 25) is inappropriate under the facts of this case. *Dickinson* was neither raised in these cases nor was it applicable. The Court in *Hero* found a flat, continuous, usage over a period of 8 years. In *Hero,* the Court notes:

However, the evidence does not establish that the A-7 and A-37, as they passed above Tract 7, were substantially more disturbing because of noise, etc. than the A-4 and F-8 had been.

The Federal Circuit held in the case at bar (App. D):

> Appellants argue that their causes of action accrued well after the 1982 critical date because noise levels did not stabilize until 1985. However, the law is clear that stabilization of the noise level is not dispositive. Rather, the dispositive issue is when the noise level reached an intolerable level and resulted in a taking. We agree with the Court of Federal Claims that the general principle of *Dickinson* applies: "a claim for taking based on continuing acts of physical invasion does not accrue until the extent of the invasion and the degree of the interference is known or should be known." *Persyn II,* 34 Fed. Cl. at 197 (citing *Aaron,* 311 F.2d at 801). We further agree with the trial court that "the extent of the invasion and the degree of interference is ascertainable when the United States *begins* to operate its aircraft at low elevation and with such frequency that they substantially interfere with the use and enjoyment of the land, with the intent to continue such flights indefinitely." *Id.* (citing *A.J.Hodges,* 355 F.2d at 596).

Noise may become "intolerable" long before it "stabilizes." If an extended period is measured from its *beginning* rather than its *end*, there is simply no extension. This reasoning is grounded neither in precedent nor logic.

Applegate and *Castro*, supra, should be controlling. They establish an authoritative linkage between the Supreme Court's ruling in *Dickinson* and the Claims Court's application of *Dickinson* to avigation easements in *Avery, Aaron & Klein*, supra. All of these authorities require "stabilization." Prior "intolerability" is irrelevant.

If the rationale of the trial and appellate courts is valid, the landowners would have to have filed at least 3 separate suits to avoid the six year bar of limitations: (1) after 1977, when the Air Force claims to have taken an easement by promulgation of the AICUZ regulation, (2) after 1979, when noise levels escalated because of the stationing of the F4C and (3) the present suit. Multiplication of needless litigation is precisely what the *Dickinson* stabilization doctrine is intended to prevent.

CONCLUSION

The landowners, overwhelmingly elderly Belgian-American farmers and Hispanics, have been ruthlessly, systematically and slowly stripped of the use and benefit of their land without compensation. This has been accomplished by the federal executive powers in Washington with the active aid and acquiesence of the municipal government of San Antonio. To date, the federal judiciary has declined to intervene. The very formidable protections afforded the landowners by the Constitution and common law of Texas have been pierced. Equally stringent safeguards arising from the Fifth Amendment and by the enactment by Congress of the Rules of Decision and Quiet Title Acts have been ignored. Even the doctrine of progressive takings pronounced by this Court has been circumvented in a most cursory fashion. Only the Supreme Court can now right this great wrong.

Respectfully submitted,

CRAIG L. AUSTIN
Attorney for Petitioners
300 Convent, Suite 2510
San Antonio, Texas 78205
210/222-2331, FAX 222-2334